

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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In the Matter of)	
)	MB Docket No. 02-277
2002 Biennial Regulatory Review)	
)	MM Docket No. 01-235
Cross-Ownership of Broadcast Stations)	
And Newspapers)	
)	MM Docket No. 01-317
Multiple Ownership of Radio Broadcast Stations)	
in Local Markets.)	
_____)	

**COMMENTS BY
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I. INTRODUCTION

We submit this comment for the Biennial Regulatory Review of Broadcast Ownership Rules, 2002 (“BRR”). In particular, we seek to comment on the Media Ownership Working Group Studies conducted in relation to the BRR. Our comment is submitted as part of a course on Regulation of TV Broadcasting, taught by Prof. Monroe E. Price at Cardozo School of law.

In considering the validity of existing regulations under Section 202 (h) of the 1996 Act, the Commission has expressed an interest in understanding the relationship between "viewpoint diversity" and the reviewed rules. Among many questions, the commission seeks comment on several aspects of diversity, including how the specific terms should be defined.¹ The definition of “viewpoint diversity” is the focus of our comment. We argue that the traditional focus of viewpoint diversity - the airing of news and public affairs programming - is a one-dimensional interpretation of the term. Instead, we argue that this is only one aspect of a much broader bundle of viewpoint diversity factors, which include, *inter alia*, sports diversity and artistic diversity. Beaming a spotlight only on the narrow aspect of “political diversity” is far from revealing the true depths of diversity.

One mode of determining the relationship between viewpoint diversity and the reviewed rules is to measure a particular output of viewpoint diversity and test the existence of that output against various cross-ownership rules. In essence, we argue that the studies should have examined diversity in the broader contexts we mention, and in programming other than news. We will refer to studies number 2, 5 and 7 to demonstrate

¹ See para. 40 of the NPRM

this point. Since the studies take the narrow approach to viewpoint diversity they do not shed light on the contribution of non-traditional programming to viewpoint diversity. Our conclusion is that these studies do not supply the “supporting factual evidence” required to sustain or repeal the rules; in the context of viewpoint diversity these studies are shallow, they do not provide sufficient relevant data or conclusions, and therefore cannot be relied upon. We will also refer to study number 9 and to a study conducted by UCLA's Center for African American Studies as examples of a studies that conform with our concept of viewpoint diversity.

II. BACKGROUND

In view of the scope of our comment, we find the analysis of the implementation of previous proceedings important. Therefore, we shall start with an introductory background, emphasizing the issues relevant to our point of view.

Following section 202(h) of the Telecommunications Act of 1996 ("the Act"), on September 23, 2002, the Federal Communications Commission ("FCC" or "the Commission") issued a Notice of Proposed Rule Making ("the Notice"). The Notice initiated a statutory biennial regulatory review of the FCC's broadcast ownership and other rules of the law governing the media market.

Throughout the years, existing rules were adopted and evolved on a rule-by-rule basis, but the Act changed the FCC's method of adapting its rules to the present. According to §202(h) of the Act, the FCC must repeal or modify any regulation it determines to be not in the public interest.

This Notice is not the first one to be issued by the FCC under §202(h). The first review pursuant to the new mandate was undertaken in 1998. In March of that year, a

Notice of Inquiry was issued, seeking comments on all ownership rules, including specifically two: the National Television Station Ownership Rule ("NTSO") and the Cable/Broadcast Cross-Ownership Rule ("CBCO")². Although comments were filed in June 1998, more than a year later the Commission did not complete its review.

Congress did not wait quietly, and made it clear to the FCC that it intends its rules to be implemented as decided and directed. If the language of §202(h) was not clear enough when stating that "the Commission shall repeal or modify any regulation it determines to be no longer in the public interest", then, in November 1999, while directing the FCC to complete the first biennial review within six months, the accompanying Conference Report further instructed: "If the Commission concludes that it should retain any of these rules under the review unchanged *the Commission shall issue a report that includes a full justification of the basis for so finding.*"³ (Emphasis added)

At this point we shall mention that beginning with the enactment of the Act, Congress made it very clear that it intends to *deregulate* the structure of the broadcast and cable television industries. Section 202(h) was meant to *continue the process of deregulation* and to review the ownership rules *within this scope*. As detailed hereunder, we argue that the Commission falls short of implementing Congress' intentions. Moreover, we argue that the studies do not satisfy the Commission's administrative duty of supplying non-biased and objective data reflecting the pros and cons whether to retain, revoke or modify the said rules. These arguments are supported by the fact that the Commission clearly ignored Congress' specific instructions, both in its outcome report of the first biennial review and in the Notice.

² 1998 Biennial Regulatory Review, Notice of Inquiry, 13 FCC Rcd 11276

³ H.R. CONF. REP. NO. 106-464, at 148 (1999)

It took the commission the whole six months quoted by the Congress to announce its decision to retain the NTSO and CBCO (by a 3-2 vote, Commissioner Powell dissenting), and it needed a few weeks more in order to issue a written report explaining its actions.

The D.C. Circuit reviewed this report. In a thorough, clear and critical decision, Chief Judge Ginsburg (Circuit Judges Edwards and Sentelle concurring) found The FCC's decision to retain the rules arbitrary, capricious, and contrary to law. The court remanded the ownership rule to the FCC for further consideration.⁴ Some of the findings of the Court are very important to the interpretation of the current biennial regulatory review.

The Commission's reluctance to implement Congress' decision is evident. First was the puzzling delay of the announcement of its decision and the explanatory report of the first biennial review. Then, when it had to defend its findings in Court, the Commission raised some bewildering arguments, trying to avoid judicial review: it argued that Congress did not intend for the Commission's biennial reviews to create a judicially reviewable action; it argued that under the Act, a "determination," unlike a rulemaking decision, is not a reviewable event; it even found the courage to argue that §202(h) does not require the FCC to submit a written report to the Congress; and concluded with another - somewhat presumptuous - argument that if its every decision to retain a rule under §202(h) were subject to judicial review, then the agency and the courts alike would face tasks so overwhelming as not to be a result sensibly ascribed to the Congress.

⁴ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 ("Fox Television"), rehearing granted, 293 F.3d 537 (D.C. Cir. 2002) ("Fox Television Re-Hearing").

The Court rejected all these arguments and noted:

We appreciate that §202(h) requires the Commission to undertake a significant task in a relatively short time, but we do not see how subjecting the result to judicial review makes the Commission's responsibility significantly more burdensome, let alone so formidable as to be improbable ... we see nothing in the 1996 Act that forecloses judicial review thereof.⁵

The Commission further contended that for a few reasons, its decision not to repeal or modify the rules was not ripe for judicial review. The Court, in an ironical and somewhat impatient remark, answered:

We find these arguments unpersuasive. First, the issues in this case are fit for judicial review because the questions presented are purely legal ones: whether the Commission's determination was arbitrary and capricious or contrary to law, and whether the challenged rules violate the First Amendment. Because the court will not review de novo the Commission's decision to retain the Rules, the Commission's argument that it is in the better position to make that determination is, while doubtless true, quite beside the point.⁶

We find it troubling that the FCC, as a government agency, finds it appropriate to raise threshold arguments as such, in a peculiar tendency to try and avoid judicial and even Congressional review.

We note our impression at this time since, as we shall demonstrate hereunder, it seems like the FCC is continuing to stall, and by commissioning the Media Ownership Working Group with the guidelines it did, it further delayed the possibility of achieving more conclusive conclusions.

⁵ *Fox Television*, 280 F.3d at 1027

⁶ *Fox Television*, 280 F.3d at 1027

The Commission is consistent in its approach of wasting time. It announced it out loud in *Fox*. There, the Commission argued that "it has properly followed the lead of the Congress in taking an 'incremental' approach to the deregulation of broadcast ownership."⁷ The Court's reply to this matter was very clear and worth reminding:

...the mandate of §202(h) might better be likened to Farragut's order at the battle of Mobile Bay ("Damn the torpedoes! Full speed ahead.") than to the wait-and-see attitude of the Commission..."(emphasis added)

Further in the *Fox* decision, the Court criticized the FCC for not providing any substantial analysis to support its conclusion. The little information presented by the Commission was described as "inadequate."

As we shall demonstrate, it seems like the studies conducted by the Media Ownership Working Group in the current biennial review fail to supply the adequate information and to provide the substantial analysis to support *any* conclusion, at least in the aspect of *viewpoint diversity* which was explored by us. If this is indeed true, the Commission will probably need much more time to further gather more *substantial* information.⁸

III. THE FIRST AMENDMENT PERMITS THE GOVERNMENT TO ENGAGE IN DETAILED EXAMINATION OF VIEWPOINT DIVERSITY

The commission elaborated on the matter of viewpoint diversity in para. 35 of the NPRM, and cited the Supreme Court's holding that "[I]t has long been a basic tenet of

⁷ *Fox Television*, 280 F.3d at 1027

⁸ Compare to concurring statement to the Notice by Commissioner Michael J. Copps

national communications policy" that "the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public".⁹

The legitimacy of viewpoint diversity as a policy goal does not solve, and indeed may even create, inherent difficulties of content-based decisions: How can the government examine viewpoint diversity without undue entanglement in content-based discrimination? Which viewpoints among the wide spectrum of viewpoint will be counted? How does the government conclude that a viewpoint has "enough voice"? Answering these questions entails content-based and viewpoint-based assessment.

Two years before the Supreme Court Decision in *Red Lion*¹⁰ was handed, Professor Jerome A. Barron wrote an article that was to help define a new role for the marketplace of ideas concept.¹¹ He gathered that the marketplace of ideas was an environment guaranteed by the first amendment. In his view, the first amendment afforded the State power over private speech to ensure a fair mix of diverse views in society and to guard against viewpoint domination by advocates of majoritarian views. Professor Barron argued that the "marketplace of ideas," once freely accessible to the public, had become foreclosed to all but wealthy media moguls.¹² Speech power had come to rest in the hands of a few. This disparity created an inequality of media access that Professor Barron believed could not be tolerated without depriving the public of a meaningful opportunity to participate in the system of free expression.¹³ To ensure equal

⁹ See *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("Associated Press"); See also *Turner I*, 512 U.S. at 663. See note 31 for our stipulation regarding this phrase.

¹⁰ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)

¹¹ See Jerome A. Barron, *Access to the Press -- a New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

¹² Barron, *supra* note 11, at 1643

¹³ *Id.* at 1655-56. Professor Barron explained: "The avowed emphasis of free speech is still on a freeman's right to 'lay what sentiments he pleases before the public.' But Blackstone wrote in another age. Today ideas reach the millions largely to the extent that they are permitted entry into the great metropolitan

access to speech power, Professor Barron favored judicial intervention and government regulation. He feared the threat of censorship by government less than he feared censorship by private media owners.¹⁴ He argued that "commercial considerations" of the private media would lead to a repression of ideas and insisted that "these media . . . not be allowed to resist controls designed to promote vigorous debate and expression."¹⁵ The state could be trusted to regulate access to the media and ensure "vigorous debate and expression." He saw in this concept no abridgement of the speaker's rights, but only an enhancement of the public's right of access.¹⁶

The critical basis of Professor Barron's construct, a right of access by members of the public to means of mass communication in private hands, would be adopted by the Court in *Red Lion* for application in the broadcast media context (but would be rejected by the Court in *Tornillo* for application in the print media context).¹⁷ *Red Lion* not only made the rights of viewers and listeners paramount to the rights of speakers in the broadcast context; it also defined as a part of this superior "right to hear" a corresponding right to viewpoint diversity. The Court has recognized this approach as constitutional, finding that "the purpose of the First Amendment" was "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."¹⁸ However, the Court found protection of that marketplace of ideas not to require a prohibition of state involvement in

dailies, news magazines, and broadcasting networks. The soap box is no longer an adequate forum for public discussion. Only the new media of communication can lay sentiments before the public, and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance. As a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant".

¹⁴ *Id.* at 1662.

¹⁵ *Id.* at 1663.

¹⁶ *Id.* at 1663.

¹⁷ Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (regulation requiring right of access by candidates who had suffered a "personal attack" held constitutional) with *Miami Herald Publishing*

the free exercise of speech, but to mandate an affirmative state obligation to ensure "the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences."¹⁹

On 1999 the FCC relaxed the duopoly rule in a way that it now permits common ownership of *two* stations in the same market, as long as eight independently owned-and-operated television stations remain in the same market after any merger. Shortly after the new duopoly rule was relaxed, Viacom Inc. merged with CBS, a merger that resulted in television duopolies in six markets. More than thirty years after he published the said article, Prof. Barron analyzed this merger in view of his unchanged opinion.²⁰

Prof. Barron argues that "the case for structural regulation of the media is stronger now than it has ever been." He continues to believe that there is a relationship between *ownership* diversity and diversity in *ideas*. Indeed, in the duopoly rule report, the Commission gave, among others, a diversity rationale, to "limit multiple ownership in the media *in order to maximize diversity of viewpoint in programming*."²¹ (emphasis added)

But Prof. Barron notes:

What does diversity mean? Does it mean numerosity of outlets? Does it mean numerosity of owners? Does it signify an abundance of formats? Is diversity just news and information? Is diversity ethnically and racially oriented programming? Is diversity defined by programming on controversial issues seeking to cover the range of opinion on such issues?²²

Co. v. Tornillo, 418 U.S. 241 (1974) (similar Florida right-of-reply law applicable to print media held unconstitutional).

¹⁸ *Red Lion*, 395 U.S. at 390.

¹⁹ *Red Lion*, 395 U.S. at 390.

²⁰ Jerome A. Barron, *VIACOM-CBS Merger: Structural Regulation of the Media and the Diversity Rationale*, 52 Fed. Comm. L.J. 555 (2000)

²¹ *Id.* at 557

²² *Id.* at 559

Barron is aware of the argument that by providing specific answers to these questions, "First Amendment tensions are inevitable", but rejects it and rightfully claims that:

Criticism of multiple ownership rules on First Amendment grounds is not new. More than twenty years ago, the Supreme Court upheld the FCC's prohibition on cross-ownership on First Amendment grounds. (citations omitted) The Court deemed the policy reasonable because "it promoted the 'public interest' in diversification of the mass communications media" and it furthered rather than contravened the system of free expression.²³

Prof. Barron warns that although government should not dominate or control the opinion process, neither should the media corporations.²⁴

Seemingly, there are conflicting legal forces surrounding the viewpoint diversity issue. On one hand, the Supreme Court permits viewpoint diversity as a policy goal and expects the commission to advance it. On the other hand the Supreme Court suspects any content-based decision, in the electronic media area in particular, and subjects such decisions to heightened scrutiny²⁵. But such legal tension is not an obstacle and should not deter the commission from making in-depth assessment of viewpoint diversity.

The intrinsic danger of viewpoint diversity judgments or entanglement is eclipsed by the danger of denying the public from "the widest dissemination of information from diverse and antagonistic sources"²⁶. We read *Associated Press* and *Red Lion* as necessitating such borderline viewpoint-based decisions as a means to achieving the

²³ *Ibid.*

²⁴ Prof. Barron mentions an interesting contention by Robert McChesney that the future will see a global media oligopoly dominated by six firms: Time Warner, Disney, Viacom, News Corporation, Sony, and Seagram. Barron agrees to McChesney's conclusion: "by any known theory of democracy, such a concentration of economic, cultural, and political power into so few hands - and mostly unaccountable hands at that - is absurd and unacceptable." Robert W. McChesney, *Rich Media, Poor Democracy: Communication Politics in Dubious Times* (1999).

²⁵ See *FCC v. Pacifica Foundation*, 438 U.S. 726; *Denver Area Educational Telecommunication Consortium, Inc. v. FCC*, 518 U.S. 727 ("Denver Area").

²⁶ *Associated Press*, 326 U.S. at 20. See note 31 for our stipulation regarding this phrase.

end.²⁷ We read *Fox Television* the same way. A remand requiring the FCC to give valid reason to support the contention that the rules under review are necessary in the public interest and promotes diversity, can only be interpreted as a ticket, and a duty, to dive into the deep and troubled waters of viewpoints.²⁸

Hence, we believe that the First Amendment permits and even requires the government to engage in detailed examination of viewpoint diversity. The consequential viewpoint entanglement that may occur is just a side effect, and the public access to a free and wide marketplace of ideas should not be sacrificed for a façade of constitutional hygiene.²⁹

27 We are not alone. See, e.g. Comments of Consumers Union, Consumer Federation of America, Civil Rights Forum, Center for Digital Democracy, Leadership Conference on Civil Rights and Media Access Project (collectively, “Consumers Union, et. al.”) MM Docket No. 01-235, at 52 (“Under the First Amendment, we can never tell people what to say, and we certainly cannot make them listen, but under the Communications Act and to serve our Constitutional principles we can organize the structural rules of the industry to increase the probabilities that more people will engage in civic discourse.”). http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512974189

28 In *Fox Television*, the court vacated the cable/broadcast cross-ownership rule, and remanded the decision to retain the national TV ownership rule, holding that the Commission’s decision to retain these rules was arbitrary and capricious and contrary to section 202(h) of the 1996 Act. *Fox Television*, 280 F.3d at 1048, 1053. The court stated that the Commission had “no valid reason to think the [national TV ownership rule] is necessary to safeguard competition”, *Id.* at 1042, or “to advance diversity”, *Id.* at 1043, and had given no reason to depart from the conclusion the Commission had reached in 1984 that the rule was no longer necessary. *Id.* at 1043-45.

29 For an opposing view, see Jonathan W. Emord, *The First Amendment Invalidity of FCC ownership Regulations*, 38 Cath. U.L. Rev. 401 (1989). Emord contends “the erroneous notion, advanced by Professor Jerome Barron and others, that the government not only may, but should, enforce a diverse “mix” of voices in the marketplace, drastically shrinks the scope of the first amendment’s protection of individual expression and places the government in the dangerous position of regulating ideological commerce”. *Id.* at 404. He argues that the *Red Lion* doctrine “completely transforms the marketplace of ideas from one uninhibited by state regulation in which anyone, whether his means be humble or great, may voice an opinion, into a “marketplace” carefully monitored and checked by state censors”. *Id.* at 462. In Emord’s view, Professor Barron fails to appreciate the full significance of his transformation of the marketplace of ideas concept: “A truly free and unrestricted marketplace of ideas does not guarantee the speaker access to another’s private property to propound a message. Rather, the “marketplace” is a metaphor for the denial of government power over speech and abdication of government control over part or all of a private forum. . . . In the final analysis, Professor Barron’s thesis fails. It presumes the impossible -- that one individual or regulatory body can arrive at a “proper mix of views and information” on matters as subjective as viewpoints on issues. It also presumes that one individual or regulatory body can make such an authoritative selection without discouraging private speech. Authoritative selection varies from regulator to regulator, and it ultimately chills speech. Even if authoritative selection could be made without a chilling effect, it would nevertheless fail to satisfy the public better than market forces, for the public prefers to make its own selections”. *Id.* at 463.

IV. CHARACTERIZING AND EXAMINING VIEWPOINT DIVERSITY

1. THE COMMISSION'S TRADITIONAL FOCUS OF VIEWPOINT DIVERSITY - THE AIRING OF NEWS AND PUBLIC AFFAIRS PROGRAMMING - IS A ONE-DIMENSIONAL INTERPRETATION OF THE TERM VIEWPOINT DIVERSITY. VIEWPOINT DIVERSITY ENCOMPASSES A WIDER BUNDLE OF BELIEFS, TASTES, LIFESTYLES, AS WELL AS CULTURAL AND ARTISTIC VIEWPOINTS, OTHER THAN POLITICAL.

The commission seeks comment on several aspects of diversity, including how the specific terms should be defined.³⁰ The definition of “viewpoint diversity” is the focus of our comment.

For more than half a century, a fundamental principle of communications policy in the United States has been that the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public..."³¹ The Commission routinely relies on this principle as a basis for its actions, and the Supreme Court of the United States has used it to support rulings in a variety of contexts related to media and communication.³²

It seems The Tribune Company adopted a similar stance in its comment. See, COMMENT of The Tribune Company with regards to the review of Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235, at 16-19:

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513077364: “What the proponents of the Rule seem to desire is a guaranteed outlet for every view. These theorists refuse to recognize that the American system entrusts the private sector with the role of qualifying viewpoints and leaves the marketplace as the guarantor of viewpoint diversity. In today’s multiple-media environment, with myriad sources and outlets for content, and varied and diverse consumer groups demanding news and information targeted to meet their needs and interests, the market will work. The elimination of the Rule will only facilitate a free market”.

³⁰ See para. 40 of the NPRM.

³¹ See *Associated Press*, 326 U.S. at 20. We find this phrase problematic. What does “widest” mean? Does it relate to the “technical” dissemination of the information, or should it be read as relating to the choice of diverse sources? Or maybe this phrase should be understood as “the widest possible prism of information”?

³² The Court has relied on this principle to hold that the First Amendment does not prohibit antitrust action against publishers who are restraining trade in news, *Associated Press*, 326 U.S. at 20; to declare that expressions of opinion which are disseminated as paid advertisements have the same level of constitutional protection that they would have if they were disseminated without payment, *New York Times Co. v.*

The commission emphasized its need for comments on whether it should consider “non-traditional news programming as contributing to *viewpoint diversity*.” This question misses the wider scope of viewpoint diversity by focusing only on the airing of news and public affairs programming, which relates to political diversity. This is only one aspect of a much broader bundle of *viewpoint diversity* factors. To name a few of the other diversity parameters, we list the following:

- **Religious diversity** - this relates to the presence or absence of religious content in the broadcast media, i.e. are there religious talk shows in the TV/ radio; is religious rock being played on the radio; are there dramas conveying religious messages.

This aspect also relates to the proportional portrayal of different beliefs and faiths in the media, i.e. does the media over-portray the views of one particular discipline? Of course, the examination must take into account local demographic influences.

- **Racial diversity** - Anyone living in the U.S. in the year 2002 will be a hypocrite not to include racial diversity in the definition of “viewpoint

Sullivan, 376 U.S. 254, 266 (1964); to invalidate a federal statute which placed limits on certain expenditures on behalf of candidates for federal elective offices, *Buckley v. Valeo*, 424 U.S. 1, 23 (1975); to overturn a municipal ordinance that limited contributions to committees formed to support or oppose ballot measures, *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 300 (1981); to uphold minority preference policies with regard to applications for new broadcast licenses, *Metro Brcdst. v. FCC*, 497 U.S. 547, 600 (1990), overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (replacing the Metro Broadcasting standard of intermediate scrutiny with strict scrutiny); to prohibit discriminatory taxation among members of the same medium, *Leathers v. Medlock*, 499 U.S. 439 (1991); and to uphold "must-carry" rules for cable television systems, *Turner Brcdst. Sys. v. FCC* (I), 512 U.S. 622 (1994), *aff'd*, *Turner Brcdst. Sys. v. FCC* (II), 520 U.S. 180 (1997).

diversity”.³³ The race of the speaker, or the race of a sit-com character, does not, in many cases, communicate a standpoint *per se*.³⁴

- **Language diversity** - i.e. how many radio stations transmit in languages other than English or Spanish? How much of the music played on radio is non-English?
- **Sports diversity** - there is no shortage of sport channels or sportscasts. But what sports are given a “voice”?³⁵ Did anyone consider the fair allocation of programming time to all preferences?³⁶
- **Ethical diversity** – Not all ethical viewpoints are necessarily religious. The clearest examples in contemporary American life are the issues of abortions, gun control and capital punishment.³⁷ How many dramas portray abortions or substance-use in a favorable way?
- **Advertising diversity** – a very problematic consequence of the market consolidation and cross ownership may be lack of advertising diversity.

³³ For a similar view, see COMMENT of The National Association of Black Owned Broadcasters, at 6-7 (regarding Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket No. 01-317).

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513084220.

Moreover, see our reference to the study conducted by UCLA's Center for African American Studies further in this comment.

³⁴ See e.g. *Prime Time in Black and White: Making Sense of the 2001 Fall Season*, UCLA Center for African American Studies, The CAAS Research Report, Vol. 1 No. 1, June 2002, where the researchers found that: 1. Prime time TV presented America primarily in black and white; 2. Race was rarely discussed explicitly in prime time; 3. Black characters were concentrated on the least watched network; 4. Monday and Saturday nights were “black nights” in prime time; 5. Black characters with the most screen time appeared on Monday nights; 6. Black characters were the most likely to appear in sitcoms; 7. Black characters were rarely seen at home; 8. Black characters were not stereotyped by occupation; 9. White control of prime time continues to hamstring efforts to diversify it.

³⁵ It appears the COMMENT of Consumers Union, et al, note 27 *supra*, at 53, regards this distinction as a matter of “variety” not “diversity”.

³⁶ Do soccer matches receive a fair share?

³⁷ We acknowledge the scientific difficulty of measuring diversity of such views along the years in light of the fact that values change. Moreover, ethical diversity is probably the most problematic of all variants of diversity in terms of government entanglement in content based decisions, since the identification of an ethical issue for purposes of conducting a study may be viewpoint influenced.

Advertising informs the consumers not only about the attributes of the product or service, but of its actual existence in their market. Are consumers in Time-Warner Cable markets exposed only or mainly to advertising for AOL-Time-Warner Internet service?³⁸

- **Artistic diversity** – Obviously, this aspect is as diverse and granulated as the universe, and assessing artistic perspectives requires more than just taste. However, some broad characteristic can be plainly identified, such as music diversity.
- **Cultural diversity** – there are many tones to this element.³⁹ Food is but one of them which can serve as an appetizing example.

This list is not exhaustive, and professional social studies and anthropology scholars will surely characterize other components of what the American culture views as “diversity”. Either way, beaming a spotlight only on the narrow aspect of “political diversity” is far from revealing the true depths of diversity. Evidently, no one would ever be able to monitor or examine the presence or absence of the various aspects of viewpoint diversity in the media in a finite manner, since the spectrum of views is infinite and limitless as the human spirit. But this cannot be an excuse for a minimal and partial

³⁸ Measuring diversity between car advertising is not important. The crux of the issue is the advertising related to and associated with the players in the media/ broadcasting/ cable businesses, such as the AOL example we mentioned. Monopolizing the advertising market is material not only in addressing the “competition” policy goal the commission identified, but also with regards to consumer exposure to advertising diversity.

³⁹ “Culture” is defined as “the totality of socially transmitted behavior patterns, arts, beliefs, institutions, and all other products of human work and thought. These patterns, traits, and products considered as the expression of a particular period, class, community, or population”. Source, The American Heritage® Dictionary of the English Language, Fourth Edition

definition of the concept of “viewpoint diversity”. A proper effort should be made to assess the availability of more aspects of viewpoint diversity.⁴⁰

2. THE COMMISSION’S TRADITIONAL EXAMINATION OF VIEWPOINT DIVERSITY, BY MONITORING THE AIRING OF NEWS AND PUBLIC AFFAIRS PROGRAMMING, CANNOT EVALUATE THE REAL AVAILABILITY OF VIEWPOINT DIVERSITY IN THE MEDIA.

The commission emphasized its need for comments on whether it should consider “non-traditional news programming as contributing to viewpoint diversity.”⁴¹ This question fails to spot the true nature of viewpoint diversity in two ways. **First**, as discussed above, by focusing only on the airing of news and public affairs programming, which relates to political diversity, the traditional examination neglects the other aspects of viewpoint diversity. **Second**, this narrow measurement ignores the bare reality in which viewpoints, even purely political, are expressed and disseminated in other genres of programming which are not “traditional or non-traditional news programming”.

Our two-headed argument involves two outcomes. First, focusing on news programming disregards the presence or absence of viewpoints that are not strictly “political”. Thus, for example, cultural diversity is not monitored since news programming does not reflect it. By the same token, it is hard to evaluate sports diversity, since a newscast is not a sportscast *per se*. Artistic diversity is virtually nonexistent in news programming, and thus its incidence will not be measured.

⁴⁰ For more discussion of the definition of diversity see, Jill Howard, *Congress Errs In Deregulating Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diversity And Violations Of Equal Protection*, 5 CommLaw Conspectus 269, 281 (1997)

There are many factors that may determine the contents of a newscast program. It may be the tight time frame, a contemporary news event orientation, and editorial discretion or the producer's influence due to economical needs. Either way, the reality is that most aspects of what we perceive as "viewpoint diversity" are not reflected in a typical newscast program. Therefore, the scope of the examination and search for viewpoint diversity should go beyond "traditional" and "non-traditional news programming", so these diversity aspects can be monitored. Only then can the public's exposure to "the widest possible dissemination of information from diverse and antagonistic sources" be truly ascertained.

Our second argument, that this narrow news-oriented measurement ignores the reality in which viewpoints are expressed and disseminated in other genres of programming, results in an even more distorting outcome. The presence or absence of viewpoints in the broadcast media but not in "traditional or non-traditional news programming", is ignored.

There are plenty of examples of expressions of political views out of the newscast context. NBC's "The West Wing" is but one example of a method of dispersing viewpoints that escape the commission's radar screen. Similarly, in the lifestyle diversity field, NBC's "Will & Grace" will not be counted in the commission's review of viewpoint diversity. Latin American soap operas, aired in Spanish, will not be counted for the language diversity calculation. NBC's "Friends" reflects single-parenthood; are there sit-coms that convey other "family values"? The commission's current definition of

⁴¹ See para. 40 of the NPRM. For example the commission asks "do "magazine shows" such as Sixty Minutes and "talk shows" such as Hardball contribute to viewpoint diversity as much as (or less or more than) straightforward news broadcasts?"

viewpoint diversity and prism of assessing it take no notice of these examples of ethical diversity.⁴²

Therefore, we answer affirmatively the commission's question "whether we should consider non-traditional news programming as contributing to viewpoint diversity"⁴³. Furthermore, we assert that the current focus on news programming is at best naïve. The commission should consider the availability, abundance and diversity of viewpoints in **all** other genres of programming.

V. THE MEDIA OWNERSHIP WORKING GROUP STUDIES SHOULD HAVE EXAMINED DIVERSITY IN THE BROADER CONTEXTS, AND IN PROGRAMMING GENRES OTHER THAN NEWS

In *Fox Television* the Court, noting that Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules, faulted the FCC's justification of its rules as lacking supporting factual evidence.⁴⁴

In order to make the 2002 biennial review more informed, and to sustain or repeal rules in light of "supporting factual evidence", the commission's Media Ownership Working Group produced a number of studies. The commission's intention was "to use the evidence collected in the studies, as well as the comments, to guide and support our decisions in this proceeding".⁴⁵

We contend that whether because of poor definition of the term "viewpoint diversity" or because of the wrong focus on news programming, the studies, in general, fail to examine the true nature and existence of viewpoint diversity in the broadcast

⁴² We stress our complete indifference as to the examples given. We do not support nor disagree with any viewpoint mentioned.

⁴³ See para. 40 of the NPRM

⁴⁴ *Fox Television*, 280 F.3d at 1041-44

media. In a nutshell, we stress that the studies should have examined diversity in the broader contexts we pointed, and in programming other than news. We will analyze studies number 2, 5 and 7 to demonstrate this point. We will also refer to study number 9 and to a study conducted by UCLA's Center for African American Studies as examples of a studies that conform with our concept of viewpoint diversity.

1. STUDY NUM. 2 IS DISTORTING AND INCONCLUSIVE: COMPARISON OF NEWS COVERAGE, BY ITSELF, IN TEN MARKETS REGARDING THE PRESIDENTIAL CAMPAIGN IS INSUFFICIENT TO ESTABLISH "POLITICAL DIVERSITY" AND LET ALONE "VIEWPOINT DIVERSITY"

Study Number 2, *Viewpoint Diversity in Cross-Owned Newspapers and Television Station: A Study of news Coverage of the 2000 Presidential Campaign*⁴⁶ can be criticized regarding its methodology, its conclusions (or lack thereof), but more to our point - in light of its underlying concept.

As we mentioned above, political diversity is but one of the many faces of viewpoint diversity. We acknowledge the fact that not every study needs, or can, examine all those faces. Furthermore, we assume that coverage of a presidential campaign embodies political diversity. The study, however, does not satisfy our model of examining diversity, since it concentrates only on "news and comment".⁴⁷ As discussed, political viewpoint can be expressed and dispersed in other forms of programming. This

⁴⁵ See para. 19 of the NPRM

⁴⁶ By David Pritchard. Our criticism relates also to Prof. Pritchard's underlying study of 3 markets conducted in 2001. See David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 Fed. Comm. L.J. 31 (2001). Implicitly, our analysis answers the COMMENT of The Tribune Company with regards to the review of Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235, at 3-5: http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513077364. The Tribune Company relies heavily on the on the conclusions of this article.

⁴⁷ See the METHOD chapter of the study.

study did not truly compare the full scope of the political message (or rather, political inclination) of the cross-owned television stations.

First we shall give examples for out-of-news political slant. NBC⁴⁸'s Saturday Night Live has political messages. It may very well be that NBC's "pure-news" coverage was neutral, but ignoring the effect of SNL on the viewers distorts the reality of viewpoint diversity. The popular genre of late-night talk shows is similarly determinative. Referring again to NBC, Jay Leno's "coverage" of candidate Bush may have been less or more favorable (a parameter identified in the study) than his "coverage" of candidate Gore.

There are other forms of programming in which political slant can be detected. Furthermore, a station can air many documentaries supporting or opposing the declared views of a certain candidate, in order to create public support or opposition to him, without actually naming the candidate. For example, the station could air documentaries about hunting, supporting views regarding gun control - positions that may be identified with one of the candidates. Airing a documentary depicting an injustice towards a prisoner on death row, may be "favorable to"⁴⁹ a candidate opposing the death penalty.

In applying these general remarks and examples to the study, we identify its weak foundations. The study determines that "diversity of views about the presidential campaign also was evident in the News Corporation's New York media. The slant of 122 coded items from the *New York Post*, which had endorsed Bush, was a robustly pro-Bush +20.49. *WNYW-TV*'s coverage, however, was rigorously neutral; the television slant coefficient of -3.70 was the result of 1 pro-Gore item out of 27 coded. The other 26

⁴⁸ We chose SNL as a well-known example, knowing that NBC was not surveyed in the study discussed, for the sake of giving a sterile example.

televised items were neutral”.⁵⁰ This pseudo-neutral slant could have been dramatically tilted if other “items”, such as late-night talk shows and documentaries would have been counted. Thus, in our opinion, the diversity between the pro-Bush newspaper and the “neutral” television station is not so evident at all. Similarly, other conclusions of “diverse slant” could have been overturned if non-news items were counted. And, obviously, findings of “similar slant” could have inverted.

Apart from our criticism of the underlying model, the study can be criticized in other aspects. First, The researcher himself admits that the limited number of observations in his study prevent us from drawing firm conclusions about the implications of the findings. Hence, the declaration that “we found no generalized evidence of ownership manipulation of the news in the situations of local cross-ownership we studied”⁵¹ is meaningless. We also stress that drawing conclusions from a comparison of ten cross-owned markets is very problematic in light of the considerable variations in market sizes and conditions.⁵² Finally, even when taking all the facts and conclusions of the study as valid and logical, The fact that five of the ten newspaper-television combinations studied presented different slants of coverage does not by itself prove “political diversity” in those five markets.

For these reasons, we argue that study number 2 should be disregarded as flawed. Its methodology and underlying concept are misleading, and the results and conclusions

⁴⁹ We used the study’s terminology.

⁵⁰ See the RESULTS chapter of the study.

⁵¹ See the DISCUSSION chapter of the study.

⁵² See COMMENT filed by “Independent Free Papers of America” with regards to the review of Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235:
http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513077644

may seriously distort the reality of the stations slant in the 2000 Presidential Campaign.

The study is inadequate to ascertain political diversity and let alone viewpoint diversity.

2. STUDY NUM. 5 SHOULD BE GIVEN VERY LITTLE CONSIDERATION IN ASSESSING VIEWPOINT DIVERSITY. ITS METHODOLOGY AND UNDERLYING CONCEPT ARE MISLEADING, AND THE RESULTS AND CONCLUSIONS MAY DISTORT THE REALITY OF THE TRUE CHOICES AVAILABLE TO THE VIEWERS

Study Number 5, *Program Diversity and the Program Selection Process on Broadcast Network Television*⁵³, will be criticized with regards to its core conception. In our opinion, program diversity is secondary to viewpoint diversity, and is actually only one of its characteristics. This study focuses solely on the actual availability of program formats, which is of minor importance in the assessment of viewpoint diversity.

Whether because of a poor definition of the question or not, this study does not examine the availability and abundance of diverse viewpoints **within** the various genres of programming. We fail to understand why the extent to which a few genres dominate prime time receives superior importance to the actual viewpoint expressed in the programs. Indeed, comedies may have “accounted for between 13-20% of the schedule during the 1960s and 1970s, and for much of this later time period that number hovered around 30%. In 1998, the percentage of situation comedies began to decline and are now back in the 15-20% range”.⁵⁴ So? What knowledge have we gained regarding the views expressed in these comedies? Is there a change in the ethical diversity, racial diversity or lifestyle diversity portrayed in these comedies? Were all the comedies concentrated around certain values, and to what extent has that changed?

⁵³ by Mara Einstein

Having said that, we acknowledge that the study is important in examining the ownership concentration in the supply side of the television industry, as well as the change in the vertical integration of the broadcast networks. But limiting the examination to genres of programming, a rather commercial form of diversity, punctures the researcher declaration that “while many media critics have decried the consolidation of the media industry due to its negative effects on diversity, this research does not support that theory. As the industry has become more consolidated, program diversity has increased”.⁵⁵ The alleged increase in **program** diversity does not rebut the argument about the negative effects of consolidation.

In order for the study to supply strong evidence of viewpoint diversity, it should have compiled empiric information of the sub-contents of each genre or format (e.g. political inclinations of newscasts, variety of sporting events, lifestyle orientations of drama and situation comedies). In the absence of such data, we are left with dry figures that convey no substantive meaning. The portion of sportscast may have increased, decreased or remained the same. But that says nothing about the variety of sports aired.

We think that the basic assumption of the study, that more program types enhance diversity as a whole, is flawed. Suppose networks devoted 8% of the time to sports during the 70’s. 10 types of sports were given a “voice” (e.g. Baseball, Basketball, Hockey, etc.). By the 90’s sports consisted only of 4%, clearing time for other genres to be aired. However, only two sports were given a voice. Is there more diversity or less diversity? Allegedly, clearing time for more program types increases program diversity. But do the viewers really enjoy more diversity?

⁵⁴ See page 9 in the study.

⁵⁵ See page 32-33 in the study.

For these reasons, we argue that study number 5 should be given very little consideration in assessing viewpoint diversity. Its methodology and underlying concept are misleading, and the results and conclusions may seriously distort the reality of the true choices available to the viewers. The study may be adequate to ascertain program diversity, one component of viewpoint diversity, but ignores all other relevant factors.

3. STUDY NUM. 7 SHOULD BE GIVEN NO CONSIDERATION IN ASSESSING VIEWPOINT DIVERSITY. ITS METHODOLOGY AND THE DATA COMPILED ARE MEANINGLESS WITH REGARDS TO THE MEASUREMENT OF VIEWPOINT DIVERSITY.

Study Number 7, *The Measurement of Local Television News and Public Affairs Programs*,⁵⁶ will be criticized regarding its methodology, its conclusions, but mainly in light of its irrelevance.

Comparing certain aspects of local news programming of affiliates to those of a network owned-and-operated stations, could have produced solid evidence to one aspect of viewpoint diversity. It would have been valuable if the study could demonstrate a different choice of news items, meaning editorial diversity.

Unfortunately, the method of measurement chosen in the study (ratings and earning awards)⁵⁷ may indicate the journalistic quality of the compared news programming, but it does not supply any empirical data with regards to the actual content and viewpoints expressed in the newscasts. Thus, the conclusion that “there is no meaningful difference between the performance of network O&Os and affiliates in the

⁵⁶ By Thomas Spavins, Loretta Denison, Scott Roberts, Jane Frenette.

ratings of local evening newscasts” is meaningless in the viewpoint context (though it may be meaningful in the localism context). Likewise, the conclusion that “with respect to the receipt of local news excellence awards, our data indicate that O&Os experience greater success than do affiliates”⁵⁸ does **not** shed any light on the difference in the contents of the news reported. Suppose all of those newscasts have the same political slant? Thus, we deem this study to be completely irrelevant in assessing any form of diversity.

In any event, even the researchers admit that the study is limited to observable differences and does not even “attempt to explain the basis for any differences or their implications for FCC media policy”.⁵⁹

4. STUDY NUM. 9, AS WELL AS A STUDY CONDUCTED BY UCLA'S CENTER FOR AFRICAN AMERICAN STUDIES, ARE GOOD EXAMPLES FOR BROAD EXAMINATION OF VIEWPOINT DIVERSITY

Study Number 9, *Radio Market Structure and Music Diversity*⁶⁰ may be criticized regarding its methodology, but we would rather use it as an example of a study that conforms with our concept of viewpoint diversity.

We point out the researcher’s core suggestion, that song diversity is an important part of the product diversity in the radio market. As we noted, music is a central component of the art we are exposed to, and therefore it plays a fundamental role in the assessment of artistic diversity. Conducting such a study is a valuable step in revealing

⁵⁷ The study used three measures: (1) The ratings received for local evening news; (2) The success at earning awards from the Radio and Television News Directors Association (RTNDA); and (3) The local television recipients of the Silver Baton of the A.I. DuPont Awards.

⁵⁸ See, REVIEW OF RESULTS section in the study.

⁵⁹ See the INTRODUCTION of the study.

one of the many faces of diversity. We note that an approach addressing music as a form of diversity, is different than the current narrow view of the commission⁶¹ that is centered on news programming. In our view, this is the only study conducted by the Media Ownership Working Group that really corresponds to our wide interpretation of viewpoint diversity.

While polishing this comment, an interesting study, conducted by the UCLA Center for African American Studies, came to our attention. Regardless of its results and conclusions, this five-year research, *"Prime Time in Black and White: Making Sense of the 2001 Fall Season"*, made use of the right methodology to address the right questions.⁶²

The study tries to make sense out of key statistics in order to help the researches to conclude on the well defined question that stood in front of them. The issue was the relationship between all aspects of television and "American racial orders".⁶³ The researchers noted:

To be sure, these debates are important because network television - despite its shrinking audience share - continues to serve as a major community forum in our nation, providing us with images of who is in and who is out, what is true and what is false, who we are and who we ought to be.

The researches accumulated the statistics from the *entire* prime-time line-ups of the six major broadcasters, over a selected period of time. Then, they broke the data into relevant comparisons, such as: scale representation of "featured" characters v. their

⁶⁰ By George Williams, Keith Brown, Peter Alexander

⁶¹ See para. 40 of the NPRM

⁶² *Prime Time in Black and White: Making Sense of the 2001 Fall Season*, UCLA Center for African American Studies, The CAAS Research Report, Vol. 1 No. 1, June 2002

⁶³ *Id.*, Page 3

representation in the nation's population (they also broke it into gender); share of episodes that were coded as "multi-racial" v. those coded "mono-racial"; and the amount of direct acknowledgment of race as a key narrative theme v. mere exhibition of undercurrents of race through settings or casts. The study even compared those items in a day-by-day slice, to compare the results with the average viewers per each of those days. Concentration of characters in different genres and their occupation of different lifestyles were also examined.

VI. CONCLUSION: THESE STUDIES DO NOT SUPPLY THE “SUPPORTING FACTUAL EVIDENCE” REQUIRED TO SUSTAIN OR REPEAL THE RULES UNDER REVIEW.

Our comment primarily addressed the complex term “viewpoint diversity” and its implications on the studies. We argued that the traditional focus of viewpoint diversity - the airing of news and public affairs programming - is a one-dimensional interpretation of the term viewpoint diversity. Beaming a spotlight only on the narrow aspect of “political diversity” is far from revealing the true depths of diversity. Viewpoint diversity encompasses a wider bundle of beliefs, tastes, lifestyles, as well as cultural and artistic viewpoints, other than political. Thus, focusing only on news programming disregards the presence or absence of viewpoints that are not strictly “political”. Therefore, the scope of the examination and search for viewpoint diversity should go beyond “political diversity” so that the availability of more aspects of viewpoint diversity can be monitored.

Our second argument was that this narrow news-oriented measurement ignores the reality in which viewpoints are expressed and disseminated in other genres of programming. Therefore, we answered affirmatively the Commission’s question whether

“non-traditional news programming as contributing to viewpoint diversity” should be considered. Furthermore, we asserted that the commission should consider the availability, abundance and diversity of viewpoints in **all** other genres of programming.

After defining the term “viewpoint diversity” and the commission’s misconceptions, we referred to four of the Media Ownership Working Group studies and one independent study. We argued that whether because of poor definition of the term “viewpoint diversity” or because of the wrong focus on news programming, most studies failed to examine the true nature and existence of viewpoint diversity in the broadcast media. We stressed that the studies pertaining the diversity goal should have examined diversity in the broader contexts we pointed, and in programming formats other than news. Therefore, we concluded that the studies aimed at assessing the diversity issues failed to shed light on the contribution of other programming formats to viewpoint diversity. We demonstrated that the studies are superficial, that they lack logical foundations, and that they do not provide sufficient relevant data or conclusions, and therefore cannot be relied upon.

Legally speaking, we conclude that these studies do not supply the “supporting factual evidence” required to sustain or repeal the rules under review. If these studies encompass all the “supporting factual evidence” the commission has, then it is utterly insufficient with regards to the viewpoint diversity issue.